



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

AUG 26 2016

OFFICE OF
GENERAL COUNSEL

Ms. Jill Williams-Hall

[exemption 6]

RE: Determination Regarding Request for a 18 U.S.C. § 208(b)(1) Waiver

I am writing in response to your request for an individual waiver pursuant to 18 U.S.C. § 208(b)(1) so that you can be detailed from your position in the Tank Management Section of the Delaware Department of Natural Resources and Environmental Control to the Environmental Protection Agency (EPA) under the Intergovernmental Personnel Act (IPA), 5 U.S.C. § 3371, *et seq.* The Office of Underground Storage Tanks, which is part of EPA's Office of Land and Emergency Management, and the State of Delaware mutually intend to enter into a one-year IPA so that you can assist EPA in overseeing underground storage tank prevention programs in States and Indian country. Your anticipated work under the IPA may affect your employer, the State of Delaware, so a waiver is necessary.

After careful consideration of the facts, I am granting you a waiver of the requirements of 18 U.S.C. § 208(b)(1) for the IPA detail. As required, my staff consulted with the Office of Government Ethics, which concurs in this waiver. Your appointing official in the Office of Underground Storage Tanks agrees to this waiver.

Federal laws regarding conflicts of interest are critical to ensuring public confidence in the integrity of Agency decision making and are not swayed by personal interests. A waiver of your imputed financial interest pursuant to § 208(b)(1) should only be granted when the disqualifying financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services to the Government. Set forth below is my application of federal law to the specific facts of your request.

The State of Delaware

The entity with which you have a conflict of interest under 18 U.S.C. § 208(b)(1) is your employer of record, the State of Delaware (hereinafter "Delaware" or the "State"). EPA is responsible for maintaining and enforcing national standards under a variety of environmental laws, in consultation with state, tribal, and local governments. In carrying out its mission, EPA delegates some permitting, monitoring, and enforcement responsibility to the states and federally recognized tribes. Thus, like other states, Delaware is directly regulated by EPA but also serves as a co-regulator in carrying out our environmental mandate.

Your Roles As They Relate to the State of Delaware and the EPA

Your position of record is Planner IV in Delaware's Department of Natural Resources and Environmental Control. In this position, you work in the Tank Management Section and have fifteen years of experience with underground storage tanks and will bring the local and state government perspective to the national policy arena. At EPA, you will be assigned to the Release Prevention Division in the Office of Underground Storage Tanks where you will serve as the program expert on prevention of leaks from underground storage tanks (UST). You will assist in developing guidance materials for EPA regions and states on implementing the revised UST regulations and develop guidance materials, conduct analyses and participate in activities related to preventing and detecting releases from USTs. You will assist in overseeing UST prevention programs in states and Indian country, including the provisions of the Energy Policy Act of 2005, but you will not work directly with Delaware. During your detail, you will not retain any responsibilities associated with your position of record in the State.

The Legal Standard

EPA will reimburse Delaware for your current state salary and benefits in the amount of \$ *exem b* (\$ *exem b* for your state salary and \$ *exem b* for benefits). In addition, EPA will pay you directly an additional \$ *exem b* to reflect the difference between your state compensation and the fact that your position at EPA will be at the GS13, step 1 level. You will not be counted against the EPA employee ceiling.

Individuals detailed to EPA under an IPA are considered to be employees of their home institution "for all purposes except work and supervision," *see* EPA's IPA Policy and Procedures Manual, p. 1-3, but are also subject to the federal ethics statutes, including 18 U.S.C. § 208, which governs financial conflicts of interest. That said, you are also deemed an "employee" for the purposes of the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, and the federal conflict of interest statutes codified at Title 18 of the United States Code. *See* 5 C.F.R. § 2635.102(h) [defining "employee" as including "employees of a State or local government ... serving on detail to an agency, pursuant to 5 U.S.C. § 3371, *et seq.*"]. You are therefore prohibited from participating personally and substantially in an official capacity in particular matters in which you have a personal financial interest or in which you have an imputed interest under 18 U.S.C. § 208. The statute is intended to prevent employees from allowing personal or imputed financial interests to affect their official actions and to protect government processes from any actual or apparent conflict of interest. The fact that you have been detailed from the State does not render this prohibition inapplicable.

Pursuant to 18 U.S.C. § 208(a), executive branch employees are prohibited from participating personally and substantially in a particular matter that will have a direct and predictable effect on their financial interests or those interests that are imputed to them.

Specifically, the statute states:

Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, ... participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be subject to the penalties set forth in section 216 of this title.

For the purposes of this provision, the financial interests of Delaware are imputed to you because you are their employee of record, and your continued employment and participation in Delaware's defined benefit plan are personal financial interests.¹ Absent a waiver from the imputed interest, you are prohibited from participating in any particular matter that affects Delaware's financial interests.

18 U.S.C. § 208 provides for the possibility of obtaining a waiver of the requirements of the provision:

- (1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee.

Your Request for a Waiver

You seek a waiver from the financial conflict of interest statute from when you begin the IPA until it ends and you return to the State. This waiver will permit you to perform the responsibilities EPA and Delaware authorize you to perform under the terms of the IPA itself.

¹ I note that you participate in the Delaware Public Employees' Retirement System, which is a defined benefit plan that provides full pension benefits at age 65. Pursuant to the regulatory exemptions, this personal financial interest is not a disqualifying one that raises concerns about participation in particular matters affecting the holdings of the plan or in particular matters of general applicability affecting the sponsor of the plan under the federal conflict of interest statute. See 5 C.F.R. § 2640.201(c)(1)(ii), 2640.201(c)(1)(iii) and 2640.201(c)(2).

Application of Applicable Law to Your Request for a Waiver and Decision

As EPA's Designated Agency Ethics Official, I am authorized to waive the criminal prohibition upon a written determination that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you, the employee. Before I render a decision I must first, pursuant to 5 C.F.R. § 2640.303, consult with the Office of Government Ethics, where practicable, which my staff has done.

In this situation, I conclude that your employment status with the State does present an imputed financial conflict of interest of the sort prohibited by 18 U.S.C. § 208, absent a waiver or applicable regulatory exemption. The statute's prohibitions are not absolute, however, and specifically authorize an agency official to waive those prohibitions in certain limited circumstances. At EPA, I am the Designated Agency Ethics Official and, as such, have the authority to grant such a waiver.

Having applied the applicable law and Office of Government Ethics guidance to the facts of this case, I have concluded that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you from now until the end of your IPA detail and therefore grant you a waiver from the prohibitions contained in 18 U.S.C. § 208 during that time period.

Legal Analysis

As articulated in the statute itself and in guidance from the Office of Government Ethics, the key determination for a deciding official is whether the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from the employee. In applying the factors articulated by the Office of Government Ethics at 5 C.F.R. § 2640.301(b), I find that:

- You and the State of Delaware are the "persons" whose financial interests are involved;
- You will be on an IPA assignment from Delaware although EPA will reimburse Delaware for your state salary and benefits and also make a payment directly to you;
- The disqualifying imputed financial interest arises from your employment status with Delaware, which raises the potential for gain or loss for the State as a result of government action that you may participate in as part of your EPA duties;
- The disqualifying personal financial interest arises from your employment status with Delaware and your continued participation in the State's defined benefit plan, which are of substantial financial interest to you;
- Delaware is directly regulated by EPA but also serves as a co-regulator in carrying out EPA's environmental mandate; and

- Your position on the IPA detail will not involve your personal and substantial participation in particular matters that involve Delaware specifically.

I have considered these factors carefully, as well as the fact that your participation in particular matters that involve the State as a specific party are not likely to affect your employment with the State or the ability or willingness of the State to meet its commitments to you under its defined benefit plan. Under the statute, then, the only remaining question is whether the interest "is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee." In considering this aspect of the statutory test, the fact that you are on an IPA detail is particularly relevant.

By signing the IPA agreement, EPA and the State both assigned you to work on national underground storage tank issues that may affect the State. The "integrity of the services" that the State and EPA expect from you in your current position is to fulfill your duties to the best of your ability to benefit both organizations. Frankly, when approving your IPA, the State recognized that your EPA scope of work may entail working directly on particular matters that involved it but placed no parameters on your ability to represent EPA's interests over theirs. There was no limit on the performance of those duties even if those duties were not fully aligned with the interests of the State on a particular matter.

In passing the IPA, Congress clearly intended for an exchange of personnel and expertise between federal government and other entities, including states. To refuse to consider a waiver at all, or to dramatically limit one, would seem to defeat that intention. I therefore conclude that your imputed financial interest in the State is not likely to affect the integrity of the services that the United States Government and EPA expect from you, so I am granting this limited waiver.

Conclusion

Based on the factual circumstances of this request, including the expectations of the State and EPA that you are performing work to benefit both organizations, and the limited nature of the request, I hereby grant the request for a waiver under 18 U.S.C. § 208(b)(1).

This waiver is limited in nature and permits only your official participation in particular matters that arise in the Office of Underground Storage Tanks that you would be participating in as part of your assigned duties. You may work on particular matters of general applicability that affect Delaware as a member of a discrete and identifiable class because I have determined that doing so is not likely to affect your employment with the State or the ability or willingness of the State to meet its commitments under its defined benefit plan. This waiver does not permit you to participate in particular matters involving specific parties in which Delaware is or represents a party. This waiver will cease to be effective when your IPA detail ends.

You understand that you remain a federal employee while on the IPA assignment, subject to the Standards of Ethical Conduct for Executive Branch Employees, 5 C.F.R. Part 2635, and the criminal conflict of interest statutes, 18 U.S.C. §§ 203, 205, 207, 208, and 209, as well as other applicable laws. If you have questions about whether a certain matter is covered by this waiver, or whether an action you may take while on detail implicates the ethics laws, you are directed to promptly seek assistance from Justina Fugh, Senior Counsel for Ethics, or me.

Finally, pursuant to 5 C.F.R. § 2640.304, a copy of this waiver will be made available upon request to the public in accordance with the procedures described in 5 C.F.R. § 2634.603. In making this waiver publicly available, certain information may be withheld in accordance with 5 C.F.R. § 2640.304 and 5 U.S.C. § 552.

Sincerely,

A handwritten signature in dark ink, appearing to read "K S Minoli", written over a horizontal line.

Kevin S. Minoli
Principal Deputy General Counsel and
Designated Agency Ethics Official

cc: Carolyn Hoskinson, Director, Office of Underground Storage Tanks
Justina Fugh, Senior Counsel for Ethics